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ORIGINAL

January 29, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Notice of *Ex Parte* Presentation, GN Docket No. 00-185, CS Docket No. 02-52

Dear Madame Secretary:

On January 28, 2003. representatives of the Alliance of Local Organizations Against Preemption ("ALOAP") met Catherine Bohigian, Legal Advisor to Commissioner Martin in the above captioned proceeding. Attending the meeting on behalf of ALOAP were: Nicholas Miller, Joe Van Eaton, & Holly Saurer of Miller & Van Eaton, and Libby Beaty of the National Association of Telecommunications Officers and Advisors.

As summarized in the attached talking points. the parties discussed: the membership of ALOAP; the interim concerns created by the above-captioned proceeding; the non-Title VI sources of local franchising authority to require franchise fees for use of the public rights-of-way to provide cable modem service; and the implications, limitations, and uncertainty of the Commission's tentative decision to classify cable modem service as a Title I information service, and not as a service ancillary to Title II or Title IV services. In addition. the patties discussed:

0+ 1

local authority to broadly enforce state consumer protection; and the applicability of state contract law to existing cable franchise agreement contracts.

Sincerely,

MILLER & VAN EATON, P.L.L.C.

By

Holly L. Saurer

cc w/o attachments: Catherine Bohigian, Legal Advisor to Commissioner Martin

1-01 HLS00576.DOC

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52

EX PARTE PRESENTATION ON BEHALF OF THE ALLIANCE OF LOCAL ORGANIZATIONS AGATNST PREEMPTION

January 28,2002

Alliance of Local Organizations Against Preemption Members

ALOAP is supported by the Alliance for Community Media ("ACM"), the American Public Works Association ("APWA"), the Greater Metropolitan Telecommunications Consortium ("GMTC") and the Texas Coalition of Cities For Utility Issues ("TCCFUI"). The ACM represents public, educational and government access organizations and users. Many of its members (like members of the organizations which comprise ALOAP) are working within local communities to ensure that all community members are able to take advantage of broadband's promise. APWA's members include the engineers and other professionals responsible for designing, building, repairing and monitoring municipal streets and other public infrastructure. The GMTC is a consortium of 28 greater metropolitan Denver, Colorado communities formed to facilitate regulation of telecommunications issues on behalf of their jurisdictions. TCCFUI is a coalition of approximately 110 cities in Texas that have joined together to, among other things, advocate their interests in municipal franchising, municipal right-of-way management and compensation, municipal public utility infrastructure, and other related issues before the Commission, the Texas PUC, the Texas legislature and other fora.

ALOAP is also being supported by individual communities and local government organizations including Alexandria, VA, Austin, TX, Buffalo Grove, IL, Chandler, AZ, Charlotte & Mecklenberg Co., NC, Chicago, IL, Chula Vista, CA, Concord, CA, Denver, CO, Dubuque, IA, Evanston, IL, Fairfax County, VA, Forest Park, Greenhills, and Springfield Township, OH, Fort Wayne, IN, Fort Worth, TX, the Illinois Association of Telecommunications Officers and Advisors, Indianapolis, IN, Irvine, CA, Kansas City, MO, Lake County, IL, Los Angeles, CA, the Metropolitan Area Communications Commission ("MACC"), representing Washington County, and the Oregon cities of Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, Hillsboro, King City, Lake Oswego, North Plains, Rivergrove, Tigard, and Tualatin, OR, Minneapolis, MN, Minnesota Association of Community Telecommunications Administrators, Miami Valley Cable Authority (OH), Montgomery County, MD, Mt. Hood Cable Commission (OR), Nashville, TN, Newport News, VA, Newton, MA, Niles, IL, Northbrook, IL, Northern Suburban Cable Commission, MN, Olympia, WA, Piedmont Triad Council of Governments rcprescnting Alamance County, Caswell County, Davidson County, Guilford County, Montgomery County, Randolph County, Rockingham County and the municipalities of Archdale, Asheboro, Burlington, Eden, Elon, Gibsonville, Haw River, High f'oint, Jamestown, Lexington, Liberty, Madison, Mayodan, Mebnne, Oak Ridge, Ramseur, Randleman, Reidsville, Yanceyville, NC, Phoenix, **AZ,** Plano, TX, Rockville, MD, San Antonio, TX, The States of California and Nevada Association of Telecommunications Officers and Advisors, Springfield, MO, St. Louis Park, MN, St. Paul, MN, St. Tammany Parish, LA, Tacoma, WA, Takoma Park, MD, the Texas Association of Telecommunications Officers and Advisors, Tucson, **AZ,** Village of Hoffman Estates, IL, Village of Oak Park, IL, Village of Skokie, IL, Vancouver, WA, Virginia Beach, **VA.,** the Washington Association of Telecommunications Officers and Advisors, and West Allis, WI.

Local Governments Are Deeply Concerned About Right-of-Way Use.

- ALOAP represents co-sovereign governments.
- Local governments must be prepared lor any emergency – national, regional **or** local – and the management, control and maintenance of the public rights-of-way are critical to the nation's emergency management systems.
- Constant disruption to the public rights-of-way creates enormous burdens on local citizens -- from traffic delays, to lost business. to vehicle damage, to loss of life and property.
- Local governments have used separate authority under state law and Title VI to:
  - Prevent "redlining" in our communities.
  - Ensure that system construction is adequate to meet the future needs of the community.
  - Ensure that system build-outs occur within reasonable time periods.
  - Enforce consumer protection laws and ensure that subscribers receive quality service at the advertised price.
  - Minimize right-of-way disruption and accidents.
  - Enforce employment anti-discrimination protections
  - Installing the additional facilities required to provide cable modem service creates significant additional burdens on the public rights-of-way.

Local Government Right-of-Way Franchise Authority *Does* Not Stem From Title VI.

- Local authority docs not depend on an affirmative grant from the federal government particularly as to matters pertaining to the use, occupancy and terms and conditions for use and occupancy of the public rights-of-way. *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir 1999).
- The Supreme Court has stated that "the cable medium may depend tor its very existence upon express permission from local government authorities," ***Turner*** *Broadcasting System v. FCC*, 512 U.S. 622. 628 (1994) and "[t]he Cable Act left franchising lo state or local authorities . . . ." *City of New York v. FCC*, 486 U.S. 57, 61 (1988).
- Courts have recognized that local authority to require right-of-way franchises pre-dates the enactment of Title VI. *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *National Cable Television Ass'n v. FCC*, 33 F.3d **66,** 69 (D.C.Cir. 1st).

Local Governments Have Authority to Require Franchise Fees to Use the Public Rights-of-Way to Provide Cable Modem Service.

- Before 1996. the franchise fee permitted under 47 U.S.C. § 542(b) reached the "cable operator's gross revenues derived. ..from the operation of the cable system." The Telecommunications **Act** of 1996 amended that section so that the franchise fee reached the "cable operator's gross revenues derived...from the operation of the cable system *to provide cable services.*"
- The legislative history demonstrated that Congress intended, at a minimum to allow localities to require fees on non-cable services as permitted under their general state and

local law authority, not to prohibit fees altogether. The goal, going forward, was simply to prevent localities from using Title VI to impose fees on cable operators providing non-cable services when fees could not be imposed on similarly situated competitors who did not provide cable service and who had no Title VI cable franchise. The goal was not to advantage the cable industry. For example, the legislative history expressly contemplates that cable operators providing telecommunications services would be subject to fees as permitted under Section 253(c). Any other result effectively allows cable operators to offer telecommunications services, for example, without paying fees paid by its competitors; and allows the operator to cross-subsidize its different lines of business.

- This is the only interpretation that avoids raising significant constitutional issues:
  - The language ofthc 1996 Act is NOT retroactive. The parties agreed Lo a level of franchise fees rind in return, cities took less in other areas -- PEG payments and I-Nets and other compensatory benefits. To apply it retroactively would create serious takings issues: there is certainly no reason why a local government should be bound lo honor the franchise if the agreed compensation is no longer paid.
  - For post-1996 contracts, the parties often agreed precisely to the timing for the change in payments, fully anticipating that the issue might bc litigated. There is absolutely no reason for the industry not to live up to these contracts, particularly in light of w lint the FCC actually ruled.

- *The Commission should clarify that local governments have non-Title VI authority to require franchise fees for cable modem service and to require cable operators to fully comply with franchise agreement contracts.*

The Commission Does Not Have Authority to Regulate Cable Modem Service Under Title I Alone.

- Relying on Title I alone denies high speed service universal service support. Providers will challenge the Commission's authority to impose universal service and other non-Title I obligations.
- Title I authority is ancillary to Title II, Title III, and Title VI authority.
  - Title I of the Communications Act "is not an independent source of regulatory authority." *California v. FCC*, 905 F.2d 1217, 1240 at n. 35 (9th Cir. 1990), *citing United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).
  - *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) ("without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded.").
  - *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1484 (D.C. Cir. 1994) ("[T]he Commission's expansive power under the Act does not include the 'untrammeled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority,'" *quoting National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976)).

- *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973) (Section 4(i) does not authorize the Commission to regulate data processing services provided by regulated entities. The court found that the Commission could regulate the offering of data processing services by common carriers because of the Commission's authority over the carriers, but also held that the Commission has no jurisdiction over data processing itself)
- *Turner v. FCC*, 514 F.2d 1354. 1355 (D.C. Cir. 1975) ("[T]he Commission must find its authority in its enabling statutes"); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) (striking down Commission rules governing the depreciation of telephone plant [hat contlicted with state regulations) (T o permit an agency to expand its power in the lace of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.") *Id.* at 374-75.

- Title 1 docs not give the Commission authority to resolve the state property law challenges in state courts. Nou-utility service providers need to obtain the permission of the public and private pi-opcrly owners to use the respective property.

Local Governments Have Authority to Broadly Regulate Cable Operators and Cable Systems Under Title VI.

- Local government regulatory authority under Title VI is not limited to regulation of "cable service " Several provisions of Title VI explicitly permit States and localities to regulate ion-cable services.
  - 47 U.S.C. §541(d)(1)(State may require informational tariff for intrastate communications services other than cable services)
  - 47 U.S.C. § 542(h) (fees may be charged for the provision of cable service or other communications service via a cable system by a third party)
  - 47 U.S.C. § 544(b)(1)(facilities requirements may be enforced).
  - 47 U.S.C. § 546(c)(1)(B)(renewal may be denied if the quality of the operator's service, but without regard to the mix or quality of cable service or other services provided over the system, has been reasonable. Where Congress meant to limit local authority over services or facilities, it said so explicitly, as in 47 U.S.C. § 541(b)(3)(D), which states an **LFA** "may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise." No such restriction applies with respect to information sei-vices).
  - 47 U.S.C. § 551(applying privacy provisions to any service provided by cable operator, and providing that nothing in the Cable Act prevents a locality from enacting consistent laws for the protection of subscriber privacy).
  - 47 U.S.C. § 554 (local government or locality may enforce EEO requirements).
  - 47 U.S.C. § 552 (locality may establish customer service and buildout schedules of the *cable operator*; consumer protection laws are protected unless "specifically preempted" by the Cable **Act).**
  - 47 U.S.C. § 542(b) (allowing localities to enforce proposals made by an operator for providing leased access to the cable system to provide services other than video programming services).

Local Governments Have Authority to Require Cable Modem Service tu Meet State and Local Customer Service Standards.

- In the NPRM, the Commission properly noted that the consumer protection provision broadly permits a locality to establish "customer service requirements of the cable operator." and not just "customer service requirements related to the provision of cable service." 47 U.S.C. § 552(a).
- Furthermore. tlic Cable Act states that "nothing in this title" preempts state or local authority to protect consumers of cable modem service, except to the extent "expressly provided" in Title VI. 47 U.S.C. § 552(d). There is no express preemption.
- Section 541(d)(2) - "Nothing in this title shall he construed to affect the authority of any state to regulate any cable operator to the cstcnt that such operator provides any communication service other than cable sei-vice ... [on a] private contract basis."
- Section 601(c)(1) - "This Act and the amendments made by this Act shall not be construed io modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act of amendments."
- *The Commission should immediately notify cable operators that cable modem service continues to be subject to local customer service standards.*

The Commission Should Mitigate the Negative Short Term Effects of the Cable Modem Order.

- Consistent with the May and October 2002 letters issued by the Consumer Information Bureau, the Commission should clarify that *March Cable Modem Order does not supercede negotiated franchise contract provisions, nor preempt enforcement of state or local consumer protection statutes, including customer service provisions applicable to cable modem service.*
- States prohibit the telephone industry from forcing POTS subscribers to subsidize DSL. *The Commission should not permit the cable industry to compel basic subscribers to subsidize cable modem broadband service.*
- The Commission should *avoid imposing unfunded mandates on local governments*

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52

COMMENTS OF THE ALLIANCE OF LOCAL ORGANIZATIONS AGAINST PREEMPTION

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Attorneys for the Alliance of Local Organizations Against Preemption

June 17, 2002

SUMMARY

The Alliance of Local Organizations Against Preemption ("ALOAP") is a consortium of national organizations formed to protect the interests of local communities in managing and promoting the development of advanced, broadband communications systems. Its members include the National League of Cities, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the National Association of Counties and the National Association of Telecommunications Officers and Advisors.

ALOAP's members collectively represent the interests of almost every municipal or county government in the United States. These local governments all join in urging the Federal Communications Commission to refrain from preempting local authority over cable modem service, as appears to be contemplated by the Notice of Proposed Rulemaking in *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* CS Docket 02-52, released March 15, 2002 (the "NPRM").

ALOAP members act as trustees,owners,and managers of valuable public property, mediators among competing uses of the public right-of-way, economic development agencies in promoting deployment of broadband facilities, users of extensive communications resources, developers and promoters of broadband applications, and regulators of cable systems and cable modem service. This proceeding vitally affects ALOAP members in all of their roles. Among other things, if localities are prohibited from collecting fees on cable modem service, they will lose approximately $284 million in revenue in 2002 and by 2006 will be losing approximately $500-$800 million in revenue annually. This revenue loss will severely affect local ability to promote development of broadband facilities and encourage development of broadband applications, not to mention numerous other governmental activities.

The Commission has no basis in law or fact to preempt local authority in this proceeding, and any attempt to preempt would raise fundamental constitutional issues under our federal system. More specifically:

- The Commission should not and cannot preclude State and local authorities from regulating cable modem service and facilities in particular ways (NPRM ¶ 98). Local authority to regulate cable modem service is protected by Title VI. Title VI contains some provisions which preempt local authority to regulate cable modem service, but explicitly and implicitly preserves local authority over cable modem service in other regards. Title I does not give the Commission authority to override the local franchising scheme approved by Congress in Title VI. As importantly, this proceeding does not just involve "regulation," as the Commission uses that term. When local governments charge fees for use of the public rights of way, or franchise use of the public rights of way, they are acting in a sovereign capacity, and exercising their rights as owners or trustees of public property. The Commission's Title I authority does not give it authority to preempt state or local governmental property rights, or authority to regulate the use of public rights-of-way generally.

- Nor does the Commission have "any additional basis for preempting such regulations" (NPRM ¶ 98). Given the Commission's classification of cable modem service as a non-cable, non-telecommunications service, there is no additional basis for preemption. The provisions to which the Commission points as potential sources of preemptive authority actually protect local authority over cable modem service.

- Even if the Commission had broad preemption authority over other forms of State and local regulation that would "limit the Commission's ability to achieve its national broadband policy, discourage investment in advanced communications facilities, or create an unpredictable regulatory environment" (NPRM ¶ 99), it should not use that authority to preempt specific state laws or local regulations. Local governments are promoting the deployment of cable modem facilities and promoting the development of broadband applications that will encourage use of cable modem facilities.

- The Commission's classification of cable modem service as an interstate information service (NPRM ¶ 102) leaves local governments free, inter alia: to require franchises for non-cable services to the extent they are not prohibited from doing so by state law, to require rents for use and occupancy of the public rights of way to provide cable modem service to the extent that they are not prohibited from doing so by state law; and to regulate the public rights-of-way and apply other requirements of local law (zoning classifications, etc.) to providers of cable modem service.

- The provision of cable modem service does place substantial additional burdens on public rights-of-way (NPRM ¶ 10). The existing franchising process allows localities to protect their interests by requiring additional authorizations before the public rights of way are used or occupied to provide non-cable services.

- Title VI does not preclude local governments from imposing additional requirements on cable modem service (NPRM ¶ 102).

- The Commission tentatively concludes that "Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service" (NPRM ¶ 102). The Commission's tentative conclusion is correct, although not for the reasons the Commission perhaps imagines. State law, not Title VI, is the source of local franchising authority. Consistent with Title VI, local governments may issue franchises *to* use and occupy public rights-of-way to provide cable services, and require further authorizations to use and occupy public rights-of-way to provide cable modem service.

- Existing law does authorize localities or states to franchise providers of information services (NPRM ¶ 102). No entity (other than perhaps an abutting property owner) can place permanent facilities in public rights-of-way without obtaining a state or local authorization to use and occupy the public rights-of-way. In some states, certain providers may be excepted from local franchising requirements (and instead may need to obtain a state authorization), but in most cases the exceptions are limited to common carriers providing telephone and telegraph services, or specified utilities with an obligation to provide uniform, universal service.

- There is no reason to permit a cable operator to avoid franchise or fee requirements that could be applied to an entity that uses and occupies the public rights-of-way to provide only an information service (NPRM ¶ 102).

- Local government actions have not delayed or prevented the deployment of cable modem services (NPRM ¶ 104). Cable modem service is widely deployed. and has obviously prospered under local government regulation.

- The NPRM's tentative conclusion that revenue from cable modem service "would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined" (NYRM ¶ 105) is incorrect. Among other things, cable modem service, as the Commission describes it, is a bundle of services which includes cable service. Under the Cable Act, because the service includes some cable services, revenues from the service are subject to a franchise fee under 47 U.S.C. § 542(b).

- Further, Title VI preserves local authority to impose fees on non-cable services. It does not need to provide "an independent basis" for assessing franchise fees on non-cable services provided by the cable operator; state and local law can (and in many cases does) provide that authority (NPRM ¶ 105)

- Disputes related to fees on cable modem service going forward do not implicate a national policy, and do not require a uniform national response, even assuming cable modem service is not a cable service (NPRM ¶ 107). At least pre-1996 *franchises* are grandfathered, so that there is no question franchise fees can be collected on cable modem service under those franchises. Going forward, authority to charge a fee on cable modem service would be a function of state and local law, and any disputes are best resolved by state courts

- It is not appropriate for the Commission to exercise its jurisdiction under Section 622, as there is no real issue with respect to past fees, even assuming for the sake of argument that there are limits on local authority going forward (NPRM ¶ 107). State law can effectively resolve any disputes that arise, and the disputes are not likely to lend themselves to uniform resolution.

- The "authority conferred on franchising authorities by section 632(a) of the Communications Act to establish and enforce customer service requirements" does in fact apply to cable modem service provided by a cable operator (NPRM ¶ 108). But local authority to regulate customer service standards does not depend on "authority conferred" by Section 632. States and localities have independent authority outside of Title VI to protect consumers.

- The provisions of Section 632(d) do apply to cable modem service (NPRM ¶ 108). There is no specific preemption of regulation of customer service regulations of cable modem service under Title VI.

- Cable modem service in included in the category of "other service" for purposes of section 631 [the privacy provisions of Title VI] (NPRM ¶ 112). Section 631 also protects local authority to establish privacy requirements.

- Cable operators can and do exercise substantial control over cable modem service (NPRM ¶ 87).

- The Communications Act requires regulatory disparity, not parity in the treatment of common carriers and cable systems (NPRM ¶ 85.) Hence, regardless of the desirability of "regulatory parity," the result in this rulemaking cannot be driven by that goal.

- There are no statutory provisions or congressional goals that would be furthered by the Commission's exercise of ancillary jurisdiction over cable modem service (NPRM ¶ 79).

The Commission has no legal authority for preempting local authority over cable modem service. Nor does the Commission have any factual justification for such an action. And Commission action in this field would not only raise fundamental issues of federalism, but would interfere with the ability of local governments to perform vital tasks that the federal government is either ill-equipped or simply not empowered to perform. Thus, federal preemption would actually harm the interests not only of local governments, but of society at large. The Commission must not lose sight of the fact that local officials have the best interests of their communities at heart and have absolutely no reason to interfere with the deployment of cable

modem services. For all these reasons, ALOAP urges the Commission to refrain from any action that would affect local authority regarding cable modem services.

TABLE OF CONTENTS

I. INTRODUCTION

A. ALOAP and Its Interests.

These comments are filed on behalf of the Alliance of Local Organizations Against Preemption ("ALOAP"), a consortium of national organizations. ALOAP was specifically formed to protect the interests of local communities in managing and promoting the development of advanced, broadband communications systems. Its members include the National League of Cities ("NLC"), the U.S. Conference of Mayors ("USCM"), the International Municipal Lawyers Association ("IMLA"), the National Association of Counties ("NACO") and the National Association of Telecommunications Officers and Advisors ("NATOA").[1]

[1] ALOAP is supported by the Alliance for Community Media ("ACM"), the American Public Works Association ("APWA"), the Greater Metropolitan Telecommunications Consortium ("GMTC) and the Texas Coalition of Cities For Utility Issues (TCCFUI). The ACM represents public, educational and government access organizations and users. Many of its members (like members of the organizations which comprise ALOAP) are working within local communities to ensure that all community members are able to take advantage of broadband's promise. APWA's members include the engineers and other professionals responsible for designing, building, repairing and monitoring municipal streets and other public infrastructure. The GMTC is a consortium of 28 greater metropolitan Denver, Colorado communities formed to facilitate regulation of telecommunications issues on behalf of their jurisdictions. TCCFUI is a coalition of approximately 110 cities in Texas that have joined together to, among other things, advocate their interests in municipal franchising, municipal right-of-way management and compensation, municipal public utility infrastructure, and other related issues before the Commission, the Texas PUC, the Texas legislature and other fora. ALOAP is also being supported by individual communities and local government organizations including Alexandria, VA, Austin, TX, Buffalo Grove, IL, Chandler, AZ, Charlotte & Mecklenberg Co., NC, Chicago, IL, Concord, CA, Denver, CO, Dubuque, IA, Evanston, IL, Fairfax County, VA, Forest Park, Greenhills, and Springfield Township, OH, Fort Wayne, IN, the Illinois Association of Telecommunications Officers and Advisors, Indianapolis, IN, Irvine, CA, Kansas City, MO, Lake County, IL, Los Angeles, CA, the Metropolitan Area Communications Commission (MACC), representing Washington County, and the Oregon cities of Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, Hillsboro, King City, Lake Oswego, Milwaukie, North Plains, Rivergrove, Tigard, and Tualatin, OR, Minnesota Association of Community Telecommunications Administrators, Miami Valley Cable Authority (OH), Montgomery County, MD, Mt. Hood Cable Commission (OR), Nashville, TN, Newport News, VA, Northbrook, IL, Olympia, WA, Piedmont Triad Council of Governments representing Alamance County, Caswell County, Davidson County, Guilford County, Montgomery County, Randolph County, Rockingham County and the municipalities of Archdale, Asheboro, Burlington, Eden, Elon, Gibsonville, Haw River, High Point, Jamestown, Lexington, Liberty, Madison, Mayodan, Mebane, Oak Ridge, Ramseur, Randleman,

NLC, USCM and NACO collectively represent the interests of almost every municipal or county government in the United States. NATOA's members include telecommunications and cable officers who are on the front lines of communications policy development in hundreds of local governments. IMLA's members include municipal and county attorneys who are responsible for crafting ordinances and franchises required to implement communications policies.

The traditional focus of the Commission in communications has been *regulatory*, and that is also true of the locus of the state public service commissions that have been charged with overseeing the development of intrastate telecommunications systems. The focus of local governments has been far more complex. Local governments have a significant *proprietary* interest in the property used by communications systems to deliver service to end users. It is well-known that wireline systems use and depend upon public rights-of-way to provide service.[2] But local governments also own and maintain street lights, traffic signals, water towers, poles,

Reidsville, Yanceyville, NC, Plano, JX, Rockville, MI), San Antonio, TX, The States of California and Nevada Association of Telecommunications Officers and Advisors, Springfield, MO, SI Louis Park, MN, St. Paul, MN, St. Tammany Parish, LA, Tacoma, WA, Takoma Park, MD, the Texas Association of Telecommunications Officers and Advisors, Tucson, AZ, Village of Hoffman Estates, IL, Village of Oak Park, IL, Village of Skokie, IL, Vancouver, WA, Virginia Beach, VA., the Washington Association of Telecommunications Officers and Advisors, and West Allis, WI.

[2] *See Turner Broadcasting System, Inc. v. FCC*, 5 12 U S. 622, 627-28 (1994) ("Cable systems, by contrast, rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers. The construction of this physical infrastructure entails the use of public rights- of-way and easements and often results in the disruption of traffic on streets and other public property. As a result, the cable medium may depend for its very existence upon express permission from local governing authorities. *See generally Community Communications Co. v. City of Boulder*, 660 I 2d 1370, 1377-78 (10th Cir. 1981)").

conduits and other structures that are used by both wireline and wireless providers to reach their customers.[3]

In addition, perhaps more than any other level of government, local governments are actively engaged in promoting economic development. Local governments have attempted to promote economic development by encouraging competition in communications markets. Communities have, for example, built "conduit freeways" in conjunction with public works projects in order to make it easier for competitors to enter the market, developed local networks in conjunction with private industry to promote facilities-based competition, and devised public rights-of-way policies that protect vital infrastructure, while making it easier for companies to enter the market.[4]

Economic development is not just about placing hardware in the ground, however. Consumers will not take advantage of broadband unless broadband offers beneficial, real world applications.[5] ALOAP members are developing and promoting applications that take advantage of the promise of broadband through a variety of initiatives, including distance learning initiatives, and initiatives designed to make broadband universally available.[6] Because local

[3] In Coral Springs, Florida, for example, the City established a procedure for leasing municipal property for use by wireless providers for placement of antennas. The City owned several structures that made it easier for service providers to reach cars passing by the City on the interstate. Coral Springs, Fla., Land Development Code, Ch. 25, art. XIV, § 2501012.

[4] *See* Part II.A for a detailed discussion; *see also* National Research Council, *Broadband Bringing Home the Bits*, National Academy Press (2002), at 206.

[5] *Little Demand For Paid Consumer Online Services, Reports Jupiter Media Metrix*, PR Newswire, May 22, 2002 ("Jupiter's latest research indicates that there is no obvious killer-app online service that consumers would pay for," said David Card, Jupiter Research vice president and senior analyst."); *BUSH ADMINISTRATION FOCUSES ON INCREASING DEMAND FOR BROADBAND*, Communications Daily, March 6, 2002 ("Many consumers don't yet see the value of broadband," . . .in Atlanta, price point of zero still wasn't sufficient motivation for half of consumers."); *Broadband waits for 'killer app', analysts say: Average consumers see no reason to move to high-speed,"* Dallas Morning News, Sept. 18, 2001.

[6] Cities are promoting both broadband wireline use and broadband *wireless* use. See Part II.A.

governments are so diverse, and because they work so closely with the public, local governments - assuming they have adequate resources – offer the best hope for development of robust e-government applications. To paraphrase the Communications Act, the goal at the local level is to "make available, so far as possible, to all the people" in the community "without discrimination on the basis of race, color, religion, national origin, or sex," rapid, efficient, advanced communications systems *and* to encourage the use of these systems. *See* 47 U.S.C. § 151.

ALOAP members thus act as trustees/owners/managers of valuable public property, mediators among competing uses of the public rights-of-way, economic development agencies in promoting deployment of broadband facilities, users of extensive communications resources, and developers and promoters of broadband applications. That is not to say the regulatory role of local government is unimportant or insignificant: local governments have had traditional responsibilities for protecting consumers and promoting competition dating back to the beginning of the Republic. *Charles River Bridge* at 547. The point is that this proceeding is not simply about regulation. This proceeding vitally affects ALOAP rncrnbcrs in all of their roles. If localities are prohibited from collecting lees on cable modern service, they will lose approximately $284 million in revenue in 2002 and by 2006 will be losing approximately $500-$800 million iii revenue annually. This revenue loss will severely affect local ability lo promote development of broadband facilities and encourage development of broadband applications.

At least one member of Congress has already recognized the policy dangers presented by this proceeding.[7] We urge the Commission to heed these concerns.

[7] Letter from The Honorable Michael E. Capuano, Member of Congress (D-Mass.) to Marlene Dortch, FCC Secretary (June 4, 2002)(on file in this proceeding).

B. Scope of Comments and Summary of Position.

These comments will address the issues raised in the NPRM at ¶¶ 98, 99, 101-108 and 111-112. The comments also address (in Part VI) certain questions raised by the NPKM at ¶¶ 81-91. Although ALOAP believes that the Commission's Declaratory Ruling in this proceeding was wrong, for purposes of these comments ALOAP will assume that cable modem service is not a cable service, and will discuss provisions of the Communications Act[8] in light of that assumption.

To answer the questions raised by the Commission, one must begin with an understanding of what the Communications Act does and does not do. First, and most important, the Communications Act is not generally the source of franchising or regulatory *authority* for municipalities or states. Long before the Communications Act was adopted, states and localities had the right to franchise entities who sought to use and occupy public rights-of-way to provide services, even interstate services. The authority to franchise (and to charge fees for use of the public rights of way) is a function of state and local sovereignty, not of federal largesse. That *is* true with respect to the Cable Act and cable systems, as the Fifth Circuit recognized in *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999). Indeed, the Cable Act generally preserves local authority except in those limited instances where local authority conflicts with an express provision of the Act. 47 U.S.C. § 556.[9] This is hardly a surprising result. As a matter of

[8] The term "Communications Act" refers to the current provisions of Title 47. The term "Cable Act" or Title VI" refers to the current provisions of Title VI as adopted by Pub. L. No. 98-549 (the "Cable Communications Policy Act of 1984" or "1984 Cable Act"), as amended by Pub. L. No. 102-385 (the "Cable Television Consumer Protection and Competition Act of 1992" or "1992 Act"), and as further amended by Telecommunications Act of 1996. Pub. L. No. 104-104 ("Telecommunications Act"). Citations to the legislative history or uncodified provisions of particular legislation will use the short form references above.

[9] Thus, for example, the Cable Act does not grant franchising authorities the right to review cable system or cable franchise transfers, nor does it establish substantive review standards. Nonetheless, the Commission has recognized that localities may review transfers, in accordance with standards established

constitutional doctrine Congress must make its intention "clear and manifest" if it intends to preempt the traditional powers of the States. *General Elec. Co.* at 78-79. Rather than "clearly and manifestly" preempt, Congress adopted Section 601(c) of the Telecommunications Act, codified *at* 47 U.S.C. § 152 nt. to prohibit the courts and this agency from construing the Act to "modify, impair, or supersede...local law unless expressly so provided...."

The following rule thus emerges from the structure of the Communications Act and black letter constitutional law: (a) localities DO NOT need specific federal authorization to require a franchise to use and occupy the public rights-of-way to provide non-cable services;[10] (b) localities do not need specific federal authority to charge fees for use and occupancy of public rights-of-way to provide non-cable services; and (c) federal limits on local authority to charge fees for use and occupancy of the public rights-of-way or to regulate non-cable services must be read narrowly; correspondingly, provisions which preserve local authority must be read broadly.

The Communications Act does not *expressly preempt* local authority to franchise or to charge fees for use and occupancy of the public rights-of-way to provide cable modem service. The Commission has no general regulatory authority to control state or local streets, much less interfere with local and state property rights. Local authority to regulate non-cable services is

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by state and local law. *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992,* Memorandum Opinion & Order on Reconsideration of the First Report & Order, 10 FCC Rcd. 4654, 4657 at ¶ 9 (1995).

[10] Some of the questions raised by the Commission are based on an apparent misunderstanding of this basic principle of federalism. For example, at ¶ 108, the Commission asks whether "the authority conferred on franchising authorities by Section 632(a) of the Communications Act to establish and enforce customer service requirements apply to cable modem service provided by a cable operator?" Section 632 does not *confer* authority – it preserves it against preemption. Even if one assumed that Section 632 only applied to cable services, one could still conclude that states and localities are free to protect consumers against billing fraud and anticompetitive practices by information service providers, just as they may prevent unfair practices by other businesses engaged in intra or interstate commerce. The Commission's final order should reflect the fact that local and state authority exists independent of the Communications Act.

limited by certain provisions of the Cable Act. as explained in Part II, but local regirlation is plainly contemplated by several Cable Act provisions One of the purposes of the 1984 Cable Act was to establish standards "which clarify the authority of Federal, state and local governments to regulate cable through the lranchise process." I1.R.Rep. No. 98-934 at 23, *reprinted in* 1984 U.S.C C.A.N. 4655 at 4660 (1984). The Commission has no authority to alter the balance that Congress **struck** by preempting rights that the Cable Act preserves.

ALOAP therefore concludes: (a) localities may require cable operators to obtain a separate lranchise to use and occupy the public rights-of-way to provide non-cable services (or may issue a single franchise addressing cable and non-cable services); (b) localities may charge a fee in the nature of a rent lor use and occupancy of the public rights-of-way to provide non-cable services; (c) localities may regulate the provision of non-cable services, albeit subject to certain limitations set forth in the Cable Act.

But even assuming *arguendo* that the Commission had authority to preempt, there would hc no sound reason for the Commission to exercise that authority in this procecding. It is quite clear that the cable industry has thrived under local regulation, and in particular: it is quite clear that local regulation has resulted in cable modem service being the dominant broadband service in the United States. Many franchises expressly authorize the provision of cable niodcrn service, subject to conditions including the payment of a franchise fee."[1] The payment of a fee has not and is not preventing roll-out of cable modem service – franchise fees have been paid by contractual agreement in communities throughout the country since the inception of cable modem service. Some communities have regulated customer service standards for cable modem

[1] *See* City of Madison, WI. Code of Ordinances. Chapter 36, Broadband Telecommunications Franchise Enabling Ordinance.

service,[12] and have required operators to roll out the service throughout the community in order to prevent redlining.[13] These actions have promoted development of the service and increased consumer confidence that the service will be provided as promised.

II. THE COMMISSION HAS NO REASON AND NO AUTHORITY TO PREEMPT LOCAL REGULATION OF CABLE MODEM SERVICE.

This Section will address the issues raised by the NPRM at ¶ 97 (considering whether local regulations discourage cable modem deployment); ¶ 98 (asking what bases there are for preempting local authority over cable modem facilities or service); and ¶ 99 (asking what specific local requirements should be preempted). We begin by showing that the predicate for these questions is misplaced. Local regulation has resulted in widespread cable modem deployment. To be sure, ¶¶ 97-99 are phrased so that they do not appear to seek the facts about cable modem deployment. The Commission simply inquires "whether we should interpret the Commission's assertion of jurisdiction under the Communications Act to preclude State and local authorities from regulating cable modem service and facilities in particular ways," as if the record demonstrated a problem existed. The Commission also seeks comments as to "any additional basis for preempting such regulations, and more specifically asks, "does section 624(b) provide preemptive authority?" Finally, in ¶ 99, the Commission appears to invite commenters to list local laws that they believe should be preempted, and to comment on the basis for preemption: "we also request comment on any other forms of State and local regulation that would limit the Commission's ability to achieve its national broadband policy, discourage investment in advanced communications facilities, or create an unpredictable regulatory

[12] Fremont, CA, Municipal Code, Chapter 7. Fremont Cable Communications Customer Service Standards and Franchise Compliance Ordinance.

[13] Ventura, CA, Franchise § 5.2 ("Franchisee shall extend its Cable System to low income areas at least as quickly as it is extended to higher income areas."); Madison, WI, Code of Ordinances § 36.20(2).

environment." We assume, however. that the Commission recognizes that its authority to preempt depends, as one critical predicate, on whether local requirements do, in fact, deter cable modem deployment and that it did not intend (to paraphrase Commissioner Copps) to make "broad pronouncements" without considering the facts.[14] We will show that based on the Commission's own mandated reports to Congress, there is no good reason to preempt any local requirements, and many good reasons not to do so But selling aside these policy issues. we then show that local authority over cable modem services and facilities is preserved, and cannot bc preempted by the Commission.

A. Localities That Are Regulating Cable Modem Service and Facilities Are Doing So In A Way That Results In Widespread Deployment.

1 *Local Regulation Has Not Impeded Cable Modem Deployment*

There is **no** credible evidence that local governments have impeded cable modem deployment. To the contrary, the evidence shows that cable inotlem service has prospered under the local franchising process and local regulation

ALOAP believes that a proper understanding of the facts – knowing what is happening *in* real communities all across the country every day as local officials try to balance the multiple needs of their constituents -- will help the Commission put this issue in perspective. The United States is an enormous country, and no central authority can adequately deal with the detailed, thy-lo-thy problems for which we have always relied on the strength, vitality and creativity of government at the local level. We tear that in its desire to address one set of concerns, the Commission will not only devise unneeded "solutions" to non-existent problems, **but** will unwittingly destroy a system that has worked well to promote the deployment of facilities while

[14] The Commission must demonstrate a "rational connection between the facts found and the choices made." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).